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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 143.

JAMES PALMER,
Appellant,

v.

CITY OF EUCLID, OHIO,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLEE.

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OPINIONS BELOW.

No opinions were delivered by any of the courts below.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on December 18, 1968. A petition for re-hearing was denied on January 22, 1969. The appeal was filed in this Court on April 22, 1969, and probable jurisdiction was noted on May 4, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED.

I.

Whether an ordinance providing for imprisonment of suspicious persons, defined as "Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;" is so vague and lacking in ascertainable standards of guilt as to fail to give fair notice of what is prohibited, invite arbitrary and discriminatory enforcement, and sweep within its ambit constitutionally protected conduct, so as to be void as in conflict with the Fourteenth Amendment's guarantee of the due process of law?

II.

Whether, consistent with the Fifth Amendment's privilege against self-incrimination, an ordinance may compel a suspect to "give a satisfactory account of himself" under pain of fine and/or imprisonment for failure or refusal to do so?

III.

Whether the Euclid suspicious persons ordinance unconstitutionally infringes freedom of movement by allowing arrest, detention, and conviction on suspicion in violation of the Fourth and Fourteenth Amendments?

STATEMENT.

The facts as set forth in the section entitled "Statement" in Appellant's brief are essentially true. Therefore, the Appellee will not belabor the Court by further recital thereof.

ARGUMENT.

I.

The Euclid suspicious persons ordinance is not so vague and lacking in ascertainable standards of guilt that it failed to give fair notice of what is prohibited, invited arbitrary and discriminatory enforcement and swept within its ambit constitutionally protected conduct, so as to violate the guarantee of due process of law of the Defendant, James Palmer. In this case, the Defendant chose to represent himself. At the time when he was permitted to make his opening argument, he informed the Court that he contended that the arrest was illegal. At no point in his statement to the Court did he assert his reasons for this contention.

With respect to the question of the weight and sufficiency of the evidence, the Court correctly allowed this issue to go to the jury. The jury, by rendering a finding of guilty, determined that the facts were such as to justify the arrest of the Defendant.

The case of *Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d. 142, 85 S. Ct. 223, clearly states that:

> "* * * when the constitutional validity of an arrest is challenged, it is the function of the Court to determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed."

The record sets forth the facts on which Patrolman Zupanic based his arrest. The vehicle driven by the Defendant was travelling at the rate of 3 to 5 miles per hour in the driveway of an apartment building at about 2:30 o'clock A.M. This vehicle had no headlights. It discharged a colored female passenger at the entrance to one of the buildings.

The vehicle was then driven to East 193rd Street where it was parked. The driver was then seen operating a two-way radio. Upon questioning by the police officer, the Defendant would give no explanation concerning his female companion. He was evasive about his address and refused to give the officer any explanation for his conduct. Furthermore, the officer testified that he knew, as a fact, that no colored females lived in the apartments on the date in question. Assuming, for the purpose of this argument, that the ordinance in question, Section 583.01, Subsection (e) of the Codified Ordinances of the City of Euclid, is constitutional (this shall be discussed later), there was certainly a quantum of facts which would warrant a man of "reasonable caution" to assume that a violation of the ordinance was occurring. The ordinance reads as follows:

> "583.01 *Suspicious Persons*
>
> It shall be unlawful for any suspicious person to be within the municipality. The following shall be deemed suspicious persons:
>
> (e) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give a satisfactory account of himself."

The Defendant was conducting himself in such a way that the totality of facts constituting his conduct were such as to arouse suspicion and he contributed nothing to dispel this suspicion by his evasive and non-conformative answers.

We now come to what is probably the only truly significant issue raised by the Defendant in his entire lengthy brief. Here, the Defendant argues that Codified Ordinance Section 583.01(e) is unconstitutional.

This issue has been decided by the Honorable Judge Williams of the Cleveland Municipal Court in *City of Cleveland v. Forrest,* 10 Ohio Misc. 98, 223 N.E.2d 661. This writer has the deepest respect for Judge Williams. It is suggested, however, that the facts in the *Forrest* case were so overwhelmingly indicative of a flagrant and gross abuse of the Defendant's rights that the Court, in its distress over the facts, lost sight of the issues and declared an ordinance almost identical with the Euclid ordinance in question unconstitutional in complete disregard for the law in Ohio.

It is axiomatic that poor facts make poor law. The *Forrest* case proves that point. Here, a woman entered a bus after conversing with someone who approached her in an automobile at a bus stop. The police followed the bus for some distance and then entered the vehicle, removed the Defendant forcibly and took her to the police station where she was charged violating the "suspicious persons" ordinance. This case could have been easily disposed of on the question of probable cause and the Court could have, as it should have, avoided the error of declaring the ordinance unconstitutional.

In deciding the *Forrest* case, the Court relied heavily upon *Columbus v. DeLong,* 173 Ohio State 81, 180 N.E.2d 158. This case dealt with a prostitute who was charged with "wandering" about the streets. Here the Court said that a prostitute cannot be "wandering" because she is moving about with the object of plying her trade.

Chief Justice Weygandt, in a vigorous dissent, indicated that the majority had engaged in hair-splitting, and that the true test of the constitutionality of the ordinance was set forth in *Morgan v. Nolte,* 37 Ohio State 23, where the Court held:

"1. The only limitations to the creation of offenses * * * are the guarantees contained in the Bill of Rights.

2. These guarantees are not infringed by Section 2108 of the Revised Statutes which authorizes cities and villages to provide for the punishment of known thieves, pickpockets, watch stuffers, etc.

3. An ordinance under this statute, providing for the punishment of any known thief found in the municipality is valid."

In *Welch v. Cleveland,* 97 Ohio State 311, 120 N.E. 206 and in *Youngstown v. Aiello,* 156 Ohio State 32, 100 N.E.2d 62, the decision in the *Welch* case was approved and followed. In the fifth paragraph of the syllabus in the *Aiello* case, the Court said:

"5. The offense of being a suspicious person does not consist of particular acts, but a mode of life, the habits and practices of the accused in respect to the character or traits which it is the object of the ordinance creating the offense to suppress."

It is obvious that the sole purpose of Section (e) of Euclid ordinance 583.01 is to prevent persons from being abroad at late hours without visible or lawful business in order to protect the businesses and residences of the community from being subjected to burglary and larceny.

Here the facts are certainly indicative of the mode of life, the habits and practices of those who engage in such conduct and the Defendant was, therefore, properly arrested.

The Court's attention is also directed to the decision of the Franklin County Court of Appeals in *City of Columbus v. McCrory,* 49 N.E.2d 583. The Court held in the first syllabus:

"The ordinance of the City of Columbus relating to suspicious persons and providing that any person wandering about the streets without being able to give a reasonable and satisfactory account of himself shall be deemed to be a suspicious person is not violative of due process of law."

II.

Comment must be made about the significance of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, as it applies to the ordinance in question. We must keep in mind that *Miranda* refers to custodial interrogation. The thrust of *Miranda* is that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination; "custodial interrogation" is questioning initiated by the law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Here, we must draw the distinction between investigatory and accusatory situations. The questions asked of the Defendant were investigatory in nature and were asked prior to his being taken to the police station. At this point, the Defendant was advised of his rights and he chose to continue answering questions which were merely cumulative in nature since the crime was actually committed and the investigation made at the scene prior to the actual arrest.

There is nothing in the *Miranda* decision which prevents an officer from making an investigation when the facts are sufficient to indicate probable cause. In the course of this investigation, before taking the subject into

custody, he may ask for a reasonable explanation of certain conduct which gives rise to the suspicion.

III.

The Supreme Court of the United States in *Terry v. Ohio*, 392 U.S. 1 (1968) upheld the right of a police officer to question and search a person under similar circumstances confronted by Patrolman Zupanic of the City of Euclid Police Department in the case before this Court.

Government has the right to pass laws which will protect its citizens from the persons who are threats to its well-being. There is nothing violative of the Fourth Amendment in an ordinance which makes it a misdemeanor for an individual to refuse to give a reasonable explanation to a police officer who has observed a course of conduct which would arouse the suspicions of a reasonably prudent person as to the activities of a person who is found abroad at late or unusual hours where it appears that he has no lawful business.

To declare this ordinance unconstitutional would do violence to the whole theory of preventive law enforcement. The true test is not the language of the ordinance, but the question of "probable cause." This is where the constitutional safeguarding exists. In the instant case, the facts scream out "probable cause" and the conviction, therefore, should be sustained by this Court refusing to accept jurisdiction of the within matter.

Respectfully submitted,

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October 30, 1970.